SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Memo to : Hon. Herman Walz, Lawrence Kasperek, Esq.
David Moss, Esq., Howard Relin, Esq.

From : Mary Lou Schloss

Re : Brief on Constitutional Issues in Topfree 7 Case

I am writing this supplemental brief pro se on the constitutional issues involved in the Topfree 7 case. In addition, I wish to join in the briefs being submitted by David Moss, Esq., on behalf of Nikki Craft, Kathleen Reilly, Debora Seymour, Elise Tooley, and Lynn Zicari and by Lawrence Kasperek, Esq., on behalf of Ramona Santorelli.

In this supplemental brief I will provide additional information to support my contention that Section 245.01 of the Penal Law of the State of New York is unconstitutional because it denies women equal protection of the law, that no important government interest exists which could justify this discrimination, and that, in fact, the current law works against important government and public interests.

In the memorandum of law submitted on August 12, 1986, it was pointed out that requiring women to wear bathing suit tops or shirts denies them the same enjoyment of sun, water and wind as experienced by men. Codefendents Lynn Zicari and Kathleen Reilly have mentioned specific ways in which bathing suit tops interfere with their pleasure. One is the discomfort and chafing caused by sand trapped between a woman's swim suit top and her skin. Another is the binding and drag produced by bathing suit tops

while women swim. These irritations are in addition to the restriction on experiencing the elements and the denial of personal freedom which Section 245.01 imposes upon women.

In the initial brief, I used national and international experience as well as opinion polls to show that women being topfree in parks and on beaches are well within the range of acceptable community standards. (A letter from a friend in Austin, Texas, describing how women use city parks and even a municipal swimming pool topfree in Austin is added here as Appendix A.)

Several witnesses at our trial related their experiences with women being topfree at public recreation areas in New York State. To validate this testimony and since the court may be particularly interested in the acceptance of topfree women in New York State, I devised a questionnaire to survey Naturist Society contacts in New York. (The Naturist Society supplied a list of people who have reported to them in recent years on naturist use of public recreation areas in New York.)

The survey found that women use many areas in New York State including some in Monroe County topfree, that this use is accepted by the general public, and that, in spite of Section 245.01, even law enforcement personnel accept the use. Although the areas are regularly used by women topfree, sometimes in the presence of police officers, the contacts are not aware of any arrests for topfree use in recent years in New York State with the exception of our arrests in Cobbs Hill Park. Women do swim and enjoy the sun topfree in public in New York State, and the

law prohibiting such behavior is rarely enforced. The completed questionnaires are attached as Appendix B.

An editorial in the Rochester Times-Union on September 22, 1986, may represent community standards in Monroe County. The editorial stated, "It seems more appropriate for a woman to be seen sunning herself top-free on a beach than for a man to be walking around downtown without a shirt - which is not all that uncommon." This editorial and other newspaper clippings relating to community standards are attached as Appendix C.)

Submitted with this supplemental brief is an audiotape (Appendix D) of a radio talk show interview with station WWCN in Albany, N.Y., taped on September 24, 1986. In the interview Ramona Santorelli and I present our case and respond to over an hour of called in questions and comments. The callers provide another measure of community standards in regard to this issue in New York State.

I have also prepared a videotape (Appendix E) which contains segments illustrating various aspects of the community standards issue. The segments include:

1) A portion of a television newscast (WOKR, June 19, 1986) contrasting fashions on a Rochester beach today with the beachwear required for men fifty years ago. This was a report in response to our initial press release.

2) A portion of a television newscast (WOKR, June 21, 1986) which reported our action at Cobbs Hill Park. The coverage was significant in that it fully showed our breasts after we removed our shirts. WOKR News Director Gil Buettner's explanation that his decision to show the nudity was based upon community standards was included in my original brief.

3) A brief history of bathing attire exerpted from the videotape, The World of Skinnydipping, by Edin and Ethel Velez.

4) Views of three locations used by women topfree: Riis Park in New York City; a popular stream ruunning out of Lake

Minnewaska near New Paltz, New York; and the best known and most heavily used naturist beach of all, Black's Beach in San Diego, California - exerpted from the videotape, Skinnydipping, by Edin and Ethel Velez.

5) Introductory information on topfree and naturist activity and views of The English Garden in Munich, Germany, a clothing-optional urban park similar to Cobbs Hill Park in Rochester - exerpted from the videotape, It's Only Natural, by Edin and Ethel Velez. (The Velez tapes are commercial videotapes which I have exerpted with permission. My apologies for the poor quality of the copy from It's Only Natural.)

6) A copy of the Donahue Show of June 26, 1986, which was devoted to the topic of topfree equality. The studio audience and callers express a variety of opinions on the subject.

At our trial, anthropologist Dana Raphael stated that changes in law usually lag behind changes in community standards. On hot summer weekends thousands of women use Black's Beach in California and Moonstone Beach in Rhode Island topfree. Martha's Vineyard in Massachusetts and Sandy Hook in New Jersey have a long history of topfree use by women. Topfree recreation by women in New York State is common and increasing. Clearly community standards cannot be used to justify this law which denies women equal protection of the law.

The original memorandum of law demonstrated a number of ways in which Section 245.01 has a negative impact upon important government interests. One such government interest is the prevention of disease.

Currently breast cancer strikes more than 112,000 American women annually. One out of 11 women will get breast cancer during her lifetime. At present the disease kills over 37,000 women annually. It is the major cancer killer of women and the leading cause of all deaths in women from ages 40 to 44. Most breast cancers are discovered by women themselves through the

regular practice of breast self-examination or accidentally. (American Cancer Society , Facts on Breast Cancer, 1984) It is therefore crucial that women feel comfortable looking at and touching their own breasts. Testimony given by Marilyn Story at the trial indicated that her female students expressed a reluctance to do this.

The obsession with beautiful, youthful breasts influences the individual's health care practices, promptness in responding to symptoms, decisions about which treatment is feasible, views about clinical trials, and subsequent responses to therapy. (Schain, Wendy, Ed.D., The Breast Cancer Patient and Her Psychosocial Matrices, unpublished manuscript.) It is imperative that women find breast masses and seek diagnosis and any neccessary treatment as early as possible. Jimmie Holland, M.D., chief of Psychiatry at Memorial Sloan-Kettering Cancer Center in Manhattan says, "Our society has placed so much emphasis on breasts that it has made treatment of breast tumors particularly difficult." (Brubach, Holly, "Beauty and the Breast", Vogue, July 1986, p.245. Attached as Appendix F.)

In a Gallup poll conducted for the American Cancer Society, 1007 women 18 years and older were polled with regard to their attitudes toward breast cancer and breast surgery. Women were evenly divided in terms of their response to having a breast removed: 32% were concerned with the emotional adjustment to mastectomy. Of the women interviewed, 51% felt they would lose their sense of feminity after mastectomy. Women more concerned about their physical appearance than the average woman were most likely to feel that mastectomy impaired their sense of feminity.

(Woods, Nancy, Human Sexuality in Health and Illness, C.V. Mosby, St.Louis, 1984, p.345)

"Recalling her clinical research with breast cancer patients in a hospital in Dijon, France, Diana Bransfield, Ph.D., now a science associate in cancer control and prevention at the National Cancer Institute in Maryland, says that most of the French women she interviewed apparently didn't regard their breasts as the primary instruments of their sexuality; many of them seemingly considered the uterus to be at its core. French women undergoing hysterectomies were commonly more fearful of losing some crucial part of their identity as women than French women undergoing lumpectomies with radiation treatment." (Ibid. Brubach, p.245.)

The value assigned to a lost breast is probably influenced by the extent to which the woman bases her sexual self-concept on her general appearance and the appearance of her breasts in particular. If she has less emotional investment in the appearance of her breasts, she may find loss of a breast less threatening than if her body image and self-esteem are founded on her breasts. (Ibid. Woods, p.345.)

Other cultures are not as mammocentric as ours. In Europe clothing optional and topfree beaches abound. Anne Cole, executive vice-president of a California swimwear house observes that, "In Europe the breast is no more erotic than the leg or any other part of the body." She claims that she didn't recognize the difference in attitude toward breasts, in spite of seeing scores of women topfree on French beaches until lunchtime "when

they all sat around wiping salad dressing off their breasts." (Ibid. Brubach, p.244.)

As women grow to feel more comfortable being topfree in public and the sight of breasts in everyday nonsexual settings becomes more common, breasts will gradually lose their significance as sex objects. As has happened in Europe, breasts will begin to be considered on a par with other parts of the body. People fear any type of surgery, particularly surgery which is disfiguring. However, as breasts lose their disproportionate significance as sex objects, women should begin to treat the possibility of breast cancer more objectively and lives will be saved.

In the original brief I referred to some of the self-esteem and health problems resulting from women's images of "ideal" breasts. Young children play with Barbie dolls and see cartoon characters such as She-ra, Princess of Power, with impossible to achieve dimensions and breasts which defy gravity. They rarely have the opportunity to see the variety of real women's breasts. At our trial psychologists Marilyn Story and Melissa Farley discussed the negative impact of people adopting these unrealistic images.

One result is the increase in risky and expensive cosmetic breast surgery as women attempt to measure up to an "ideal" breast standard. "In 1984 alone, 95,000 women nationwide chose to enlarge their breast size. About 1 million such procedures have been done since the first implant almost two decades ago." (Talan, Jamie, "Blame Mattel: Barbie's Bust Is Surgical Boon", Times-Union, Rochester, N.Y., October 2, 1986, p.1C,5C.) This

article attached as Appendix G further explores the relationship between unrealistic breast images and surgery.)

An additional problem related to these surgical proceedures is that they may prevent or interfere with a woman's ability to breastfeed, an important stated government interest. (Tyler, Sandra, and Gail Woodall, Female Health and Gynecology, Robert J. Brady Co., Maryland, p.175.) Breastfeeding, in addition to being beneficial to babies as explained in the original brief, may have important health benefits for mothers. "In countries where breastfeeding is common, breast cancer is uncommon. In the United States, the incidence of breast cancer has steadily risen while the frequency of breastfeeding declined." (Lawrence, Ruth A., Breastfeeding : A Guide For The Medical Profession, C.V.Mosby, St. Louis, 1980, p.104.)

A study by Ing et al. in 1977 found that "in postmenopausal women who have breastfed unilaterally, the risk of cancer is significantly higher in the unsuckled breast. They believed that breastfeeding may help protect the suckled breast against cancer." (Ibid. Lawrence, p.106.)

As women become more comfortable their breasts and breastfeeding, the health of both mothers and their infants should improve. Eliminating Section 245.01, not retaining it, would serve important government interests.

This memorandum of law is meant to supplement my brief submitted on August 12, 1986, not to stand on its own. This supplemental information supports my assertion that Section 245.01 denies women equal protestion of the law, that no

important government interest exists which could justify this discrimination, and that, in fact, the current law works against important government and public interests.

Dated: October 6, 1986